IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF RESPONDENT

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio (A 130) reported in 48 O.S. (2d) 270, 358 N.E. (2d) 556 2nd, and the unreported opinion of the Court of Appeals of the First Appellate District (A 144) are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is based upon the order of the Court dated June 27, 1977, in which this Court granted a Writ of Certiorari to the Supreme Court of Ohio under 28 U.S.C. Section 1257 (3) in which this Court accepted

jurisdiction on the question of whether or not the Ohio death penalty statute violated the Eighth Amendment of the United States Constitution as to cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States, the Ohio statutes with regard to the death penalty and certain other Ohio statutes.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

B. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C. THE OHIO AGGRAVATED MURDER STATUTES:

Section 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Section 2920.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity

of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

Section 2920.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.03 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court

pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Section 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revcised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history. character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the of-

fender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

THE OHIO COMPLICITY (AIDER AND ABETTOR) STATUTE:

OHIO REVISED CODE

E. Complicity, Section 2923.03, Revised Code.

1. Text of Section 2923.03, R.C. eff. 1-1-74

Section 2923.03 (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration

of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 12. Determination and judgment on appeal

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO

Art. IV, § 2

§ 2. Supreme court.

* * *

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals AS A MATTER OF RIGHT the following:

(i) Cases originating in the courts of appeals;

(ii) CASES IN WHICH THE DEATH PENALTY HAS BEEN AFFIRMED;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)

(Capitalization ours for emphasis)

QUESTIONS PRESENTED

Whether the imposition of the sentence for the crime of aggravated murder under the laws of the State of Ohio (effective January 1, 1974) violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Bell and one Samuel Hall were jointly indicted by the Grand Jury of Hamilton County, Ohio, on November 22, 1974, for two counts of aggravated murder with specifications, one count of kidnapping and one count of aggravated robbery. Petitioner Bell and Samuel Hall were tried separately, each to a three-judge panel from the Court of Common Pleas for Hamilton County, Ohio.

On January 10, 1975, Petitioner's motion to determine his ability to stand trial was heard by a single trial judge. After hearing the evidence the court found the Petitioner to be competent to stand trial. After that determination had been made the Petitioner voluntarily waived a trial by jury and requested a three-judge panel to hear the case (R 53-58).

Four days later on January 14, 1975, Petitioner's motion to suppress the statement Petitioner had given to the police was overruled. That same day the trial on the merits commenced before the three-judge panel.

The evidence revealed that the petitioner and Samuel Hall had borrowed Samuel Hall's brother's car and that they drove to the Park Lane Apartments on Victory Park-

way and Reading Road in Cincinnati, Ohio. As the victim drove his car into the parking area for said apartments the defendants drove in behind him. The victim, Mr. Graber, was forced out of his car and kidnapped at gunpoint and forced to lie in the trunk of his car. At that time the petitioner drove the car of Samuel Hall's brother back to the brother's residence. Samuel Hall drove the victim's (Mr. Graber) car with the victim inside of the trunk back to his brother's residence. When Samuel Hall picked up the petitioner he turned the driving over to the petitioner. The petitioner drove the car to a generally isolated area and the co-defendant Samuel Hall picked out a side drive and told the petitioner to pull the car into the isolated area. The petitioner drove the car into the side drive and without any further directions from Hall turned the car around so that the trunk of the car was the furthest from the road (R 340). After the car was parked the petitioner asked the co-defendant Hall what they were going to do next. He then turned off the lights to the car and backed it further into the isolated area off of the roadway. The petitioner then gave Samuel Hall the keys to the car and they removed the victim from the trunk of the car and led him into the woods.

Robert Pierce who lived in an apartment building adjacent to the isolated roadway was sitting outside in his car at the time. He had just arrived and he observed the car off the roadway with only the parking lights on. He then "heard two doors close; one after the other" (R 160). The next thing he heard was "Don't shoot me. Don't shoot me." Then he heard a shotgun blast, a short interval of time passed and he heard a second shotgun blast. Mr. Pierce continued to watch the cemetery as Samuel Hall entered the automobile from the passenger's side and moved over to the driver's seat. The car then approached

the roadway without any headlights on and turned onto the highway and drove off into the night.

The police were notified immediately. They responded to the scene of the shooting within minutes. Mr. Graber had sustained a shotgun blast to the rear of his head. The officers detected signs of life by way of pulsating blood emanating from the exposed area of the brain (R 190). The life squad was then summoned. However, by the time the life squad transported Mr. Graber to the Cincinnati General Hospital, he had expired.

Later, at the morgue, the officers discovered that Mr. Graber had attempted to secret valuables such as his ring, money and keys in his pockets and shoes. In the opinion of the Coroner the fatal shot to the rear of Mr. Graber's head was fired at contact range with Mr. Graber's hands being clasped behind his head at the time of the shooting.

After the shooting the Petitioner and Samuel Hall drove to Dayton, Ohio, in the victim's automobile. The next morning they went to a gas station where they commandeered the gas station attendant Kenneth Hardin into the trunk of his automobile at gunpoint. The petitioner held the gun on the attendant while the co-defendant Hall removed the keys and put the new victim in the trunk. Samuel Hall drove the car with the new victim in the trunk and the petitioner followed behind in the car of the victim Graber; who had previously been killed. Fortunately, a state highway partolman stopped Samuel Hall who was driving the new victim Hardin's car for a faulty muffler. The petitioner, who was following in the first victim Graber's car saw the state highway patrolman stop his companion. He then continued on to Cincinnati where he abandoned the Graber victim's automobile in a vacant garage near his home.

One week after the homicide the police went to the Petitioner's residence to ask him to come with them to the police station to answer some questions concerning Samuel Hall. Once it became apparent that the Petitioner was also involved in the homicide of Julius Graber, the police advised him of his constitutional rights.

The officers told the Petitioner they would like him to make a tape recorded statement and that he had a right to have his mother present with him when he gave the statement if he so desired. The Petitioner stated he did not want his mother to be present. The police then called Petitioner's mother, advised her that her son was involved in a homicide and kidnapping and that he had admitted his involvement. Petitioner's mother informed the police she did not want to come down to the police station and that her son could give the statement.

Expert testimony revealed that the fatal shot was fired from the same shotgun that was recovered from the Hardin vehicle that Samuel Hall was driving at the time of his arrest. Further expert testimony demonstrated that Petitioner's fingerprint was located on the outside window on the driver's side of the Graber vehicle.

Based on the evidence adduced at trial the three-judge panel found the Petitioner guilty of Aggravated Murder while committing Kidnapping as well as finding him guilty of Aggravated Robbery and Kidnapping.

Pre-sentence and psychiatric examinations were ordered pursuant to the Ohio statutes prior to the imposition of sentence. On February 3, 1975, a mitigation hearing was held before the three-judge panel.

The mitigation hearing consisted basically of the pre-sentence report that the Court had ordered; the testimony of the psychiatrists appointed by the Court and some teachers of the petitioner.

The pretrial psychiatric report reflected that although "he did admit having taken a tablet of 'Mescaline Blue', which he claims was a downer, and also smoking marijuana; however, HIS PERCEPTIONS WERE NOT DISTORTED AND THERE WAS NO EVIDENCE FROM HIS HISTORY THAT HE WAS HAVING HALLUCINATIONS OR ANY OTHER DRUG EFFECT." (Appendix 39) (Capitalization ours for emphasis).

The presentence report further reflected that his "mental status conducted by the examiners indicated that he was in contact with reality, his thought processes were clear, logical and coherent" (Appendix 39).

His general attitude was " 'ITS JUST A MATTER OF LIFE AND DEATH'." (Appendix 39) (Capitalization ours for emphasis).

In the postconviction psychiatric report which was before the Court for mitigation purposes the defendant-petitioner Bell stated "that he was not afraid of Sam Hall" (Appendix 43).

In the course of this post conviction psychiatric report the defendant-petitioner "admitted that he had taken up with Sam Hall because he admired his style and the fact that he had always hung around older individuals." (Appendix 44).

The psychiatrists concluded that "direct mental status examination revealed again that his thinking was clear, coherent, and well organized . . . (and) . . . on standard psychological mental status testing he scored an IQ of about 110 to 120." (Appendix 44).

The examiners concluded that in so far as the psychological aspects of the mitigation were concerned the defendant had shown none of them.

The defendant's prior record as a juvenile reflected amongst other things that he was found guilty on different occasions as a juvenile of housebreaking, riding in a stolen car, robbery, auto theft, and trespassing. (Appendix 51). The presentence report further reflected that the sentences of the Juvenile Court which included probation, house arrest and fines did not cause any "perceivable alteration on his behavior pattern".

The presentence report further reflected that "both Hall and Bell accused each other of actually firing the sawed-off shotgun" (Appendix 51).

According to the presentence report Bell admitted to the investigator that he "backed into the access road so that Graber (the victim) could get out of the back of the vehicle without being seen."

In the course of the mitigation hearing the psychiatrist chosen to present the unanimous opinion of the panel of three psychiatrists stated that Willie Bell did not have a mental psychosis or a mental deficiency at the time of the killing (Appendix 103 and 104).

The Court then heard the arguments of counsel on the question of mitigation. Counsel for the defendant-petitioner in his arguments, amongst other things, argued the question of the defendants age as a mitigating factor and (if you believe the self-serving story of the petitioner that Hall actually shot the decedent) the fact that his client did not actually pull the trigger of the gun.

After hearing all the evidence the court unanimously found no mitigating circumstances to be present. Accordingly, the Petitioner was sentenced to death.

The conviction and sentence were affirmed by the Court of Appeals of the First Appellate District of Ohio, Hamilton County, on April 12, 1976. The Supreme Court of Ohio affirmed the conviction and sentence on December 22,

1976. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on January 14, 1977. The Petitioner then filed a Petition for Certiorari which was granted on June 27, 1977.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Counsel for the respondent concedes the fact that counsel for the defendant-petitioner attacked the constitutionality of the death penalty statute as being violative of the Eighth and Fourteenth Amendments to the United States Constitution. However, counsel specifically reflects and calls this Court's attention to the fact that the death penalty was attacked on the basis that the very nature of the penalty made it unconstitutional and by the arbitrary and capricious manner of its enforcement under the Ohio Revised Code (Appendix 19).

For the purpose of the record counsel for the respondent denies that the other attacks on the constitutionality of the Ohio death penalty statute were ever raised in the trial Court or lower courts.

SUMMARY OF ARGUMENT

We submit that in order to fully understand and comprehend the reasons we believe the Ohio dealth penalty statutes to be constitutional, one must look to the history of the statutes and death penalty and the interpretations given that statute by the Courts.

In 1972 this Court in the case of *Furman* v. *Georgia*, 408 U.S. 238 (1972), declared that the death penalty statutes in the various states were unconstitutional. There were many varied opinions rendered in that case with certain justices indicating that the death penalty under all circumstances was unconsttutional and others indicating that under the appropriate circumstances the death penalty was constitutional. Between these two general lines of reason a third line of thought appeared in which the justices appeared to indicate that they believed that there was too much uncontrolled discretion without any guidelines in the implementation of that discretion so that the death penalty was being imposed in an arbitrary, capricious and standardless manner which resulted in a wanton and freakish imposition of said penalty.

Two general lines of thought then arose as to interpreting this Court's decision in the *Furman* case (ibid).

The first line of thinking was to make the death penalty mandatory upon the showing of certain types of crime without any discretion in the imposition of the sentence. This line of reasoning was subsequently determined not to be appropriate as reflected in this Court's opinion in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

The second line of thinking was that the death penalty itself was not unconstitutional provided there was even-handed justice and there were guidelines to insure that

it would not be inflicted in an arbitrary and capricious manner.

The legislature of Ohio followed this second line of interpretation when they enacted the new criminal code and the included death penalty statutes in response to this Court's decision in the *Furman* case (ibid).

In Ohio not every murder brings on the death penalty. It is only in certain specific types of cases that the death penalty may be imposed.[1]

Not only is the death penalty limited to the certain specific type of cases but it is also required that the state

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[1] "Ohio Revised Code 2929.04 Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment . . . . and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or certain specific office holders specifically enumerated.

(2) The offense was committed for hire.

(3) The offense was for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another committed prior to the offense at bar, or the offense at bar was a part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender.

(6) The victim was a law enforcement officer whom the offender knew to be such and either the victim was engaged in his duties at the time or it was the offenders purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit or fleeing after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary."

specifically set forth the aggravated circumstance in the indictment and prove it beyond a reasonable doubt.[2]

Therefore the legislature has clearly set forth certain specific definable standards in limiting the type of cases (murder cases) in which this penalty can be imposed.

If this were all that was before the Court and if the legislature had left out the mitigating circumstances; then the Ohio statute would be unconstitutional under the majority opinion in *Woodson* v. *North Carolina,* 428 U.S. 230 (1976).

As indicated, Ohio has two parts to its hearing in death penalty cases; the first being the trial and proof of the defendant's guilt; and, the second being the mitigation hearing.

Rather than leave the matter to the unbridled discretion of the trial court judge, and to assure the even handed administration of justice in the imposition of this penalty, the Ohio legislature set forth specific guidelines for the trial judges to follow at a mitigation hearing, thus assuring the uniform implementation of the sentence.[3]

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[2] Ohio Revised Code 2929.04(A).

[3] Ohio Revised Code 2929.04(B)

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed but the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offenders psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The Supreme Court of Ohio, in interpreting the new Ohio death penalty statute, determined that the Ohio mitigating factors were similar to these approved by this Court in *Proffitt* v. *Florida,* 428 U.S. 242 (1976).[4]

They also indicated that they would review each case to assure the uniform and fair imposition of the death penalty by trial judges.[5]

The Ohio Supreme Court went on to state that they would "allow the broadest consideration of mitigating circumstances consistent with their language."[6]

The Court also stated that the mitigating circumstances must be liberally construed in favor of the accused.[7]

The Supreme Court of Ohio went on to determine that the age of the defendant and his prior record were relevant factors to consider at the mitigation hearing.[8]

Thus it can be seen that the Ohio statute in its two step procedure affords to the defendant all of the guarantees to specifically limit the type of cases in which the death penalty is imposed and to place guidelines on the

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[4] "The mitigating factors, as with any legislation may require judicial interpretation and clarification, but they are basically reasonable and similar to these approved in *Proffitt* v. *Florida,* supra. (49 L. Ed. 2d 913) and they do clearly guide the sentencing judge or judges in their decision." *State* v. *Bayless,* 48 O.S. (2d) 73 (1976) at page 86.

[5] "We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio trial judges." *State* v. *Bayless,* 48 O.S. (2d) 73 (1976) at page 86.

[6] *State* v. *Bayless,* 48 O.S. (2d) 73 (1976) at page 86.

[7] "This language must be strictly construed against the state and liberally construed in favor of the accused R.C. 2901.04(A)." *State* v. *Woods,* 48 O.S. (2d) 127 (1976) at page 134 and 135.

[8] *State* v. *Bell,* 48 O.S. (2d) 270 (1976) at page 280; Appendix page 141.

mitigation hearing to assure its evenhanded fairness in a uniform manner throughout the state.

We further submit that a defendant who has received the death penalty has an absolute right of appeal both to the Court of Appeals and to the Supreme Court of Ohio which reviews each case on an individual basis to assure that the death penalty is not imposed in a wanton or freakish manner.

We therefore submit that based upon the issue on which the Supreme Court has admitted this case on certiorari; the Ohio statute is constitutional.

Defense counsel have endeavored to sneak into this matter a completely new issue; to the effect that the Ohio statute is unconstitutional in violation of the Sixth Amendment to the Constitution. This Court granted certiorari in this matter relative to violations of the Eighth and Fourteenth Amendments to the Constitution and not with regard to the Sixth Amendment. However, even if this Court were to consider this Sixth Amendment argument; it is our opinion that this Court has disposed of this issue in the *Proffitt* v. *Florida* case.[9]

We therefore submit that our arguments as hereinafter set forth will in response to the issues presented by the petitioner; clearly show that the Ohio death penalty under the new Ohio Revised Code is constitutional insofar as its language, its interpretation and its imposition.

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[9] "This court . . . . has never suggested that jury sentencing is constitutionally required . . . ." *Proffitt* v. *Florida*, 428 U.S. 242 (1976) at page 252.

ARGUMENT

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAWS OF THE STATE OF OHIO (EFFECTIVE JANUARY 1, 1974) IS CONSTITUTIONAL AND DOES NOT VIOLATE THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY THE EIGHTH AND THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In 1972, this Court declared the various state statutes imposing the death penalty to be cruel and unusual punishment as they were then written in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At that time the Ohio Legislature was in the process of redrafting the entire criminal code. By virtue of the number of opinions and determinations contained therein in the *Furman* v. *Georgia* case as reported in 408 U.S. 238 (1972), there was no clear determination as to what type of statute would pass constitutional scrutiny by this Court. Certain state legislatures adopted mandatory death penalties without any mitigating factors. Others adopted a two part proceeding with the types of cases in which the death penalty could be imposed specifically limited. After a determination of guilt, a mitigation type hearing would be had in which guidelines for extending mitigation would be set to assure the even-handed administration of this type of hearing to all persons charged.

The Ohio and Florida legislatures were two of the many

who set up this two part proceeding with guidelines on the second part.

Subsequently this Court released its decisions in five of the cases pending before it involving the death penalty.[10]

We respectfully submit that the Ohio statute will pass the constitutional tests previously enunciated by this Court in light of the fact that:

(1) The death penalty is only applicable in Ohio as a punishment in a case in which a life has been taken;

(2) Only specifically designated types of killing (specifications of aggravation) can bring on the death penalty;

(3) The legislature has by statute set forth broad general guidelines for the conduct of the mitigation hearing;

(4) The statute and the judicial interpretation thereon has set up the purpose of the mitigation hearing "is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons be tempered out of consideration for the individual offender and his crime;"[11]

(5) The Ohio statutes require the Court to obtain a presentence report and a psychiatric examination of the defendant with copies of each being furnished to counsel;

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[10] *Gregg* v. *Georgia*, 428 U.S. 153; *Jurek* v. *Texas*, 428 U.S. 262; *Proffitt* v. *Florida*, 428 U.S. 242; *Woodson* v. *North Carolina*, 428 U.S. 280; and *Stanislaw Roberts* v. *Louisiana*, 428 U.S. 325.

[11] *State* v. *Woods*, 48 O.S. (2d) 120 at page 137 (1976).

(6) The mitigating circumstances in O.R.C. Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty;

(7) Every death sentence is reviewed by way of the right of direct appeal to the Court of Appeals and the Supreme Court of Ohio.

We believe that the totality of the statute, the interpretations given said statute by the upper Ohio courts, and the manner of appellate review will clearly reflect that the Ohio death penalty statutes is neither violative of the Eighth or Fourteenth Amendments to the United States Constitution.

I.

THE OHIO CAPITAL PUNISHMENT STATTUTES PROVIDE BROAD GENERAL GUIDELINES IN THE SENTENCING PROCEDURE SO AS TO CHANNEL THE JUDGES DISCRETION IN ORDER TO INDIVIDUALIZE THE SENTENCE TO THE PARTICULAR DEFENDANT AND THEY PROVIDE FOR A MEANINGFUL CONSIDERATION OF THE CHARACTER AND RECORD OF THE OFFENDER AND THE NATURE AND CONSIDERATION OF HIS INVOLVEMENT IN THE DEATH OF ANOTHER AT SAID MITIGATION OF SENTENCE HEARING.

We take strong exception to the statements in counsel's brief that the Ohio sentencing procedures provide for a mandatory sentence.

As we will reflect in the various subparagraphs of our brief, we will show where the legislature has set up specific guidelines and where the Supreme Court of Ohio has interpreted those guidelines so that the punishment assigned for the criminal act, for ethical and humanitarian reasons, is tempered out of consideration for the individual offender and his crime. We further submit that absent any guidelines upon which the mitigation shall or shall not be granted would bring us right back to where we started before *Furman*.[12]

We submit that the Supreme Court of Ohio in this case and in others has provided that the statutory grounds for mitigation shall "be liberally construed in favor of the accused." (Appendix 142).

The statute itself specifically provides that the Court shall consider "the nature and circumstances of the offense and the history, character, and condition of the offender."[13]

As will be reflected in this portion of our brief, Ohio has set up guidelines which are broadly construed in favor of the offender so as to individualize the sentence to the offender and thereby assure that the sentence will not be imposed in an arbitrary or capricous manner.

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[12] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[13] Ohio Revised Code 2929.04(B).

A. THE OHIO CAPITAL PUNISHMENT STATUTES ARE NEITHER NARROW NOR RIGID AND THEY DO NOT AFFRONT THE CONSTITUTIONAL PRINCIPLES FORBIDDING MANDATORY SENTENCES.

We would like to state at the very outset that the Ohio death penalty statutes are not mandatory as the defendant-petitioner's counsel would indicate on his subparagraph a of part one of his brief.

It is to be noted that counsel even concedes that the Ohio death penalty statute is not mandatory in his brief.[14]

As this court stated in *Gregg* v. *Georgia*, 428 U.S. 169 at page 175:

> "In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests upon those who would attack the judgment of the representatives of the people."

Thus, this Court has stated that the death penalty in and of itself is not unconstitutional and as long as the penalty selected is not cruelly inhumane or disproportionate to the crime it is constitutional.

The death penalty in Ohio can only be inflicted for a person who has caused the death of another and who has been found guilty of one of the specific aggravating specifications beyond a reasonable doubt.

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[14] "While the Ohio death penalty is not absolutely mandatory, Ohio's capital statutes are 'unduly harsh and unworkably rigid'." (Brief of Petitioner 19.)

We then come to the question of whether the Ohio death penalty is cruelly inhumane. This Court in *Woodson* v. *North Carolina,* 428 U.S. 280 (1976), in effect stated that a mandatory death penalty without the ability of any type of mitigation procedure and without the ability to temper and individualize the sentence was unconstitutional.

We submit that the Ohio statute is not mandatory (conceded by the petitioner's brief) nor is it so narrow or rigid as to affront the constitutional guarantees of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court gave its general approval to a bifurcated procedure separating the determination of guilt from the sentencing procedure.[15]

Ohio has such a bifurcated system. In the guilt finding portion of the case the state must show that there was a murder committed in the limited specified types of cases and must prove beyond a reasonable doubt one or more of the specifications.[16]

The Ohio Legislature provided for a situation that meets one of the tests in which this Court determined the Georgia law to be constitutional.

We do not believe there is any question relative to the aggravating specifications of the Ohio statute in specific types of murder cases only passing constitutional scrutiny.

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[15] "When human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, A BIFURCATED SYSTEM IS MORE LIKELY TO ENSURE ELIMINATION OF CONSTITUTIONAL DEFICIENCIES IDENTIFIED IN FURMAN." *Gregg* v. *Georgia,* 428 U.S. 169.
(Capitalization ours for emphasis.)

[16] Ohio Revised Code 2920.03(B).

In fact, in Georga, the jury is permitted to consider any aggravating circumstance. This goes well beyond the limitations placed on this type of a crime by the Ohio legislature.

Referring to the Georgia statute which is similar to Ohio's bifurcated trial this Court held on page 206 of the *Gregg* case (ibid):

> "While the jury is permitted to consider any aggravating or mitigating circumstance, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death.
>
> In this way the jury's discretion is channelled. No longer can a jury wantonly and freakishly impose the death sentence, it is always circumscribed by the Legislative guidelines."

As this Court held in *Proffitt* v. *Florida,* 428 U.S. 242 at page 258:

> "While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authorities' discretion is guided by requiring examination of specific factors that argue in favor of or against the imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."

We then must turn our attention to the Ohio statutes and the matters to be raised by way of mitigation. In order to insure uniform guidelines and equal evenhanded justice in the administration of those guidelines the state statute sets up certain requirements and guidelines for the mitigation hearing.

First of all, the state requires that the Court obtain a presentence investigation of the defendant with copies of

said report being furnished to the prosecutor and either the defendant or his attorneys.[17]

In addition to the presentence report, the statute requires the Court to obtain a psychiatric examination of the defendant with copies of said report being furnished to both the prosecutor and either the defendant or his attorneys.[18]

Thus it can be seen that the defendant does not have to do a thing and the Court is required by law to individualize the sentence for the crime for which the defendant has already been found guilty.

The Court is also required to hear other testimony, if offered. In fact, the statute is so broad as to permit the defendant to orally make a statement or testify without being required to swear to said statement and he is not even subject to cross-examination by the prosecutor.[19]

We then go to the statute specifically spelling out the mitigation process. This statute provides that regardless of the proof of the defendant's guilt beyond a reasonable doubt of the crime and his guilt of one or more of the listed aggravated specifications beyond a reasonable doubt, the death penalty "is precluded when, considering the nature and circumstances of the offense and the history and character, and condition of the offender, one or more of the following is established by a preponderance of the evidence.

(1) The victim of the offense induced or facilitated it.

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[17] Ohio Revised Code 2929.03(D).

[18] Ohio Revised Code 2929.03(D).

[19] ". . . if the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation." Ohio Revised Code 2929.03(D).

(2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.[20]

We find it somewhat difficult to fully understand and respond to the petitioner's arguments with regard to the above-mentioned mitigating circumstances.

One of the basic objections to the death penalty statutes before *Furman*[21] was the unbridled, unchannelled discretion, without guidelines, that trial Courts could use to impose the death penalty.

We find that the petitioner's argument that the Ohio statutes do not permit discretion to extend mercy without guidelines is one of the basic reasons why the statute is constitutional.

As this Court stated in the *Proffitt*[22] case, the requirement that the sentencing authority examine specific mitigating factors that argue against the imposition of the death penalty, eliminates the arbitrariness and capriciousness in the imposition of said penalty.[23]

If we have unbridled, unchallenged discretion in granting mercy, how can the Courts compare one sentence as against another? There must be some uniformity or guide-

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[20] Ohio Revised Code 2929.04(B).

[21] *Furman* v. *Georgia*, 408 U.S. 238.

[22] *Proffitt* v. *Florida*, 428 U.S. 242.

[23] *Proffitt* v. *Florida*, 428 U.S. 242 at p. 258.

lines. Absent these guidelines, we are right back where we were before *Furman*[24]

We then look to the guidelines themselves.

The first specific mitigating factor is:

"The victim of the offense induced or facilitated it."

Counsel for petitioner reflects that "except in the rarest and most improbable factual situations" will this mitigating factor ever be appropriately applied. We are not certain as to how many defendants have or have not escaped the death penalty by way of this specification of mitigation in the trial Courts, but we are aware of the fact that two defendants owe their lives to a Court of Appeals reversing their death sentences because of it. Counsel for petitioner appears to equate the mitigating factors to the guilt factors which we believe to be an improper conclusion on his part.

As the Court of Appeals for the Fifth Appellate District of Ohio in the cases of *State* v. *Hines,* CA 634, and *State* v. *Lucas,* CA 639, in unreported decisions released on February 25, 1977, stated with regard to this first item of mitigation:

> "We note at the outset that the above mitigating circumstance (s) is unlike the second and third in that here the emphasis is on the victim rather than the offender. In short, the 'induce or facilitate' provision provides for mitigating, i.e., lessening the seriousness of the crime because of the conduct of the victim . . . . We thus conclude that the legislative intent expressed in R.C. 2929.04 (B) (1) is limited to unlawful conduct on the part of the victim which induces or facilitates the offense."

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[24] *Furman* v. *Georgia,* 408 U.S. 238.

The Fifth District Court of Appeals then quoted from *State* v. *Woods,* 48 O.S. (2d) 127 at page 137, in which that Court stated:

> "This definition appropriately allows consideration of the broad range of information relevant to mitigation set out in R.C. 2929.04, including 'the nature and circumstances of the offense and the history, character, and condition of the offender.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime. As the United States Supreme Court has said: '* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions * * *' *Williams* v. *New York* (1949), 337 U.S. 241, 247.
>
> Construing R.C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing including the nature and circumstances of the offense and the history, character and condition of the defendant, in making the determination of whether a sentence of death should be reduced to life imprisonment because

of duress or coercion . . ." (The 5th District Court of Appeals underlined those above portions for emphasis).

They then stated in their opinions:

> "We construe this language to mean that the issue of whether the mitigating condition has been established by a preponderance of the evidence must not be considered in a vacuum but rather shall be weighed in conjunction with the nature and circumstances of the offense as well as the history, character, and condition of the defendant."

The Court of Appeals then affirmed the judgment of conviction but reversed the death sentence to a life sentence.

Thus we see, as to the first mitigating factor, that there are broad general guidelines to apply and they have actually been applied on appeal by an upper Ohio appellate Court as to two defendants.

The second mitigating factor is:

> "It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation."[25]

We believe that we can have no better determination of the second mitigating factor than to quote the Ohio Supreme Court in the case of *State* v. *Woods*, 48 O.S. 2d 127 at pages 134, 135, 136 and 137 in which that Court held:

> "The question is whether this evidence was sufficient to justify mitigation of sentence. R.C. 2929.04 (B) provides that the death penalty:
>
> . . . . is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of

[25] Ohio Revised Code 2929.04(B)(2).

> the following is established by a preponderance (sic) of the evidence:
>
> . . . .
>
> 2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> THIS LANGUAGE MUST BE STRICTLY CONSTRUED AGAINST THE STATE AND LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED. R.C. 2901.04(A).
>
> In construing and applying the words 'duress' and 'coercion,' WE MUST NOTE FIRST THAT THOSE TERMS WOULD BE A VIRTUAL NULLITY IF THEY WERE TAKEN TO APPLY TO THE LEGAL STANDARD FOR DURESS AS A DEFENSE TO A CRIMINAL charge.
>
> In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder itself, not of aggravated murder, and he would not then be subject to the death penalty. Accordingly, TO HAVE ANY EFFECTIVE MEANING, THE TERMS 'DURESS' AND 'COERCION' IN R.C. 2929.04(B) MUST BE CONSTRUED, IF POSSIBLE, MORE BROADLY THAN WHEN USED AS A DEFENSE IN CRIMINAL CASES. This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial, he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution. *State* v. *Robinson* (1976), 47 Ohio St. 2d 103, 351 N.E. 2d 88.
>
> THE CONCEPTS OF DURESS AND COERCION ARE ALSO FOUND IN CIVIL LAW AND

HAVE BROADER MEANING. THE APPLICATION OF THOSE CONCEPTS VARIES GREATLY, AND TURNS LARGELY UPON THE CIRCUMSTANCES OF EACH INDIVIDUAL CASE, INCLUDING THE CHARACTER OF THE ONE SOUGHT TO BE INFLUENCED. As this court held in *Tallmadge* v. *Robinson* (1952), 138 Ohio St. 333, 109 N.E. 2d 496, paragraph two of the syllabus:

> 'In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather THE EFFECT UPON THE PARTICULAR PERSON TOWARD WHOM SUCH CONDUCT IS DIRECTED, AND IN DETERMINING SUCH EFFECT THE AGE, SEX, HEALTH AND MENTAL CONDITION OF THE PERSON AFFECTED, THE RELATIONSHIP OF THE PARTIES AND ALL THE SURROUNDING CIRCUMSTANCES MAY BE CONSIDERED.'

Duress usually connotes some degree of force or threat of force, but duress has also been found when the conduct of one person induces another to enter into a contract against his own volition or judgment, generally out of fear, but also in some cases because of extreme persuasion or pressure of circumstances. 13 Williston on Contracts (3 Ed.), Section 1608. Coercion is generally defined more broadly to include undue influence and other lesser forms of compulsion. It has been said that:

> 'The words "coercion" and "duress" are not synonymous, although their meanings often shade into one another. "Duress" generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person (or to some near relative of the person) to be influenced, or applied to the property or reputation of such person. "Coercion" may include a compulsion brought about by moral force or in some other manner with or without physical force.'

> . . . .

These judicial definitions of coercion correspond to the common use of the word. Webster's Third New International Dictionary defines coercion as 'the act of coercing: use of physical or moral force to compel to act or assent,' and to coerce as 'to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation).'

The essential characteristic of coercion which emerges from these definitions is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

THIS DEFINITION APPROPRIATELY ALLOWS CONSIDERATION OF THE BROAD RANGE OF INFORMATION RELEVANT TO MITIGATION SET OUT IN R.C. 2929.04, INCLUDING 'THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. RATHER, THE PURPOSE OF MITIGATION IS TO RECOGNIZE THAT THE PUNISHMENT ASSIGNED FOR A CRIMINAL ACT MAY, FOR ETHICAL AND HUMANITARIAN REASONS, BE TEMPERED OUT OF CONSIDERATION OF THE INDIVIDUAL

OFFENDER AND HIS CRIME. As the United States Supreme Court has said:

> '* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions * * *.' *Williams* v. *New York,* (1949), 337 U.S. 241, 247.

CONSTRUING R.C. 2929.04(B) LIBERALLY IN FAVOR OF THE ACCUSED, WE THINK THAT THE STANDARD STATED IS APPROPRIATE FOR THE TRIAL JUDGE OR JUDGES TO APPLY TO THE FACTS PRESENTED AT THE MITIGATION HEARING, INCLUDING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, IN MAKING THE DETERMINATION OF WHETHER A SENTENCE OF DEATH SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE OF DURESS OR COERCION."

(Capitalization ours for emphasis.)

Thus it can readily be seen that the Ohio Supreme Court has substantially broadened the definition of coercion and duress and each is individualized to the nature and circumstances of the case, the history, character and condition of the defendant.

The Supreme Court has also directed that the language in the mitigation statute must be strictly construed against the state and liberally construed in favor of the accused.

Thus we have a guideline which is broadly construed against the state and in favor of the defendant and which is tempered to the individual defendant on an individualized basis.

The third mitigating factor to be considered by the trial judge in the mitigation hearings is:

> "The offense was primarily the product of the offenders psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity."

The Supreme Court of Ohio in the case of *State* v. *Bayless,* 48 O.S. (2d) 73 at page 96 defined the term mental deficiency as that term is used in the mitigation process. They held that:

> "Mental deficiency is consistently defined to mean a low or defective state of intelligence, construing the term broadly, a deficiency may be severe or mild and may be hereditary or caused by a brain defect, disease, or injury, or by whatever other conditions might cause subnormal intelligence."

The Supreme Court of Ohio then in the case of *State* v. *Black,* 48 O.S. (2d) 262 (1976) at page 268 went on to broaden the definition of this section of the code and stated:

> "(3) The offense was primarily the product of the offender's *psychosis* or *mental deficiency,* though such condition is insufficient to establish the defense of insanity. (Emphasis added.)
>
> It is clear that the General Assembly chose the emphasized language to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus, BROADLY DEFINED AND HOWEVER EVIDENCED, ANY MENTAL STATE OR INCAPACITY MAY BE CONSIDERED IN LIGHT

OF ALL THE CIRCUMSTANCES AND INCLUDING THE NATURE OF THE CRIME ITSELF SO THAT IT MAY BE DETERMINED WHETHER THE CONDITION FOUND TO HAVE EXISTED WAS THE PRIMARY PRODUCING CAUSE OF THE OFFENSE. To define terms such as those used in the statute is to narrow them.

It has often been charged that our definition of legal insanity is too narrowly defined. For the appellant to claim that the mental state for purposes of the mitigation hearing also needs to be so defined, is to bind the conscience of the trial court initially, and of the appellate court and this court on review. The language used has a saving grace, for it will permit the examination of the mental state of the offender, whether juvenile, adolescent or adult, in light of the offense, the offender, and all of the circumstances of the crime, for the purpose of reaching a decision on humane grounds as to whether society needs to exact the ultimate penalty."

(Capitalization ours for emphasis.)

The Supreme Court of Ohio in speaking on the question of mental deficiency stated in this case at page 280 (Appendix 140) :

> "However, WE DO NOT AGREE THAT A MINOR IS PER SE 'MENTALLY DEFICIENT' WITHIN THE MEANING OF R.C. 2929.04 (B) (3). Such an intention by the General Assembly could have easily been provided for by clear and simple language. Upon review of the statute, we do not believe the General Assembly intended that a 17-year old defendant is conclusively 'mentally deficient.' The ninth proposition of law is overruled."
>
> (Capitalization ours for emphasis.)

The Ohio Supreme Court went on to say in this case at page 281 (Appendix 141) :

"It has been alleged that the mitigating circumstances under R.C. 2929.04 (B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R.C. 2929.04 (B) states that 'THE DEATH PENALTY * * * IS PRECLUDED WHEN, CONSIDERING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER' (emphasis added), ONE OR MORE OF THE MITIGATING CIRCUMSTANCES IS ESTABLISHED. THIS CONCLUSION IS BUTTRESSED BY THE REQUIREMENT THAT THESE STATUTORY PROVISIONS BE LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED."

(Capitalization ours for emphasis.)

They concluded their remarks with a statement at page 282 (Appendix 142) :

> "WHILE REJECTING APPELLANT'S CLAIM THAT A MINOR DEFENDANT IS PER SE 'MENTALLY DEFICIENT' WE DO HOLD THAT A DEFENDANT'S AGE IS A PRIMARY FACTOR IN DETERMINING THE EXISTENCE OF A MENTAL DEFICIENCY. SENILITY, AS WELL AS MINORITY, MAY WELL BE RELEVANT, AND THEREFORE PROPERLY CONSIDERED, IN DETERMINING WHETHER THE OFFENSE WAS A PRODUCT OF MENTAL DEFICIENCY."
>
> (Capitalization ours for emphasis.)

We believe that a full and complete interpretation of the Ohio Statutes relative to the death penalty as reflected by

the Legislature and interpreted by the Court clearly reflects that the Ohio statutes are broad and general enough so that they do not affront the constitutional principles of mandatory sentences. The guidelines set up by the legislature, and their judicial interpretations, provide for the even handed administration of justice and avoid the arbitrary and capricious imposition of the death penalty.

B. THE CHARACTER AND THE RECORD OF THE OFFENDER ARE A MEANINGFUL PART OF THE MITIGATION PROCESS IN CAPITAL CASES IN OHIO.

This general title is in response to the allegation by counsel for the petitioner that Ohio statutes preclude the meaningful consideration of the character and record of the offender. We strongly disagree with this interpretation by the petitioner.

First of all, if we look to the statute itself it says:

> ". . . . the death penalty is precluded. When, considering the nature and circumstances of the offense and the HISTORY, CHARACTER, AND CONDITION of the offender . . ."[26]
> (Capitalization ours for emphasis.)

As the Supreme Court of Ohio held in this very case and as reflected on page 141 and 142 of the appendix:

> "It has been alleged that the mitigating circumstances under Revised Code 2929.04 (B) are unconstitutionally narrow because a number of very important factors such as age and criminal record of the defendant appear to be irrelevant to the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as Revised Code 2929.04 (B) states that the death penalty . . . . is precluded when, considering the nature and circumstances of the offense *and the history, character, and condition of the offender* (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused."

[26] Ohio Revised Code 2929.04(B).

We respectfully submit that we doubt how the Court could have spoken out stronger.

The statute provides for the consideration of the history, character and condition of the defendant. The Supreme Court says that this is a mandatory requirement of the statute and further states that this requirement must be construed in favor of the accused.

We submit that the guidelines have been established by the statute and the Supreme Court's interpretation of that statute. We further submit that the lower trial courts in Ohio are carrying out the mitigation hearings under those guidelines. It is our belief that a number of defendants have had the benefit of this interpretation.

To name just one, we refer to the case of *The State of Ohio* v. *William Bell Mascus*[27] in which the trial court judge stated:

> "The determination that I have to make is whether considering THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HIS-

[27] An unreported decision by the Court of Common Pleas (trial court) of Hamilton County, Ohio rendered September 2, 1976.

TORY, CHARACTER AND CONDITION OF THE OFFENDER it has been established by a preponderance of the evidence that the offense was primarily the product of the offender's psychosis or mental deficiency, though such deficiency is unable to establish the defense of insanity."
(Capitalization ours for emphasis.)

In its conclusion the trial judge in the *Mascus* case stated:

". . . . . I can't envision a person like Mascus KNOWING ALL THAT I KNOW ABOUT HIM, AND THE PARTICIPATION IN A CRIME SUCH AS WAS HIS PARTICIPATION IN A CRIME, THE CHARACTERIZATION OF THE CODEFENDANT SUCH AS WERE THE CHARACTERIZATIONS OF THIS CODEFENDANT, and reports such as we have gotten . . . . ."
(Capitalization ours for emphasis.)

The trial court in the *Mascus* case then went on to determine that, based on the above, the mitigating factor was shown and the death penalty was set aside.

I submit the above case to the court not to reflect that it is of great importance or that other courts lower than the Common Pleas Court are following the pronouncements of that court,[28] but rather to show that the pronouncements of the statute and the Ohio Supreme Court are being carried out by the lower trial courts in individualizing the sentence to the offender and in guaranteeing the even handed administration of the death penalty proceedings and sentence in this state.

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[28] There are no lower trial courts in Ohio to try a capital offense.

As the Fifth District Court of Appeals held in the cases of *State* v. *Hines*[29] and *State* v. *Lucas*:[30]

"We construe this language (referring to *State* v. *Woods*, 48 O.S. (2d) 127 at page 137 (1976)[31] to mean that the issue of whether the mitigating condition has been established by a preponderance of the

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[29] *State* v. *Hines*, Fifth District Court of Appeals of Ohio case No. C A 634. (Decision rendered February 25, 1977 and unreported).

[30] *State* v. *Lucas*, Fifth District Court of Appeals of Ohio case No. C A 639. (Decision rendered February 25, 1977 and unreported).

[31] "THIS DEFINITION APPROPRIATELY ALLOWS CONSIDERATION OF THE BROAD RANGE OF INFORMATION RELEVANT TO MITIGATION SET OUT IN R. C. 2929.04, INCLUDING 'THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, THE PURPOSE OF MITIGATION IS TO RECOGNIZE THAT THE PUNISHMENT ASSIGNED FOR A CRIMINAL ACT MAY, FOR ETHICAL AND HUMANITARIAN REASONS, BE TEMPERED OUT OF CONSIDERATION OF THE INDIVIDUAL OFFENDER AND HIS CRIME. As the United States Supreme Court has said: '• • • The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions • • •.' *Williams* v. *New York* (1949), 337 U.S. 241, 274.

Construing R.C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing, INCLUDING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, in making the determination of whether a sentence of death should be reduced to life imprisonment because of duress or coercion."
(Capitalization ours for emphasis.)

evidence must not be considered in a vaccum but rather shall be weighed in conjunction with the NATURE AND CIRCUMSTANCES OF THE OFFENSE AS WELL AS THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT.
. . . . .

As for the history, character and condition of Hines and Lucas, they emerge as self indulged, drug oriented youthful failures of marginal intelligence but with no history or pattern of violence."
(Capitalization ours for emphasis.)

The death penalty was then set aside by the Fifth District Court of Appeals of the State of Ohio as to both defendants.

As can be seen, both the Ohio Court of Appeals and the trial courts are giving meaningful consideration to the history, character, and condition of the defendant in the conducting of the death penalty mitigation hearings and in the sentencing thereunder.

C. THE MITIGATING FACTORS TO BE CONSIDERED BY THE TRIAL COURT IN CAPITAL CASES IN OHIO ARE BROAD AND GENERAL ENOUGH SO AS TO INSURE THAT THE DEATH PENALTY WILL NOT BE IMPOSED IN AN ARBITRARY OR CAPRICIOUS MANNER.

As the Court held in *Gregg* v. *Georgia*[32] at page 195:

"In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority has adequate information and guidance."

This Court went on to say in the same case that they were not limiting the sentencing factors to those before them in the *Gregg* case but that they will examine each system on an individualized basis.[33]

In the *Gregg* opinion this Court recognized the difficulty in setting standards to guide a capital jury's sentencing deliberations but further pointed out that the Model Penal Code had set forth guidelines.[34]

The guidelines set up by the Model Penal Code and reflected in this Courts opinion are:

(1) The defendant has no significant history of prior criminal activity.

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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[32] *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

[33] *Gregg* v. *Georgia*, 428 U.S. 153 (1976) at page 195.

[34] *Gregg* v. *Georgia*, 428 U.S. 153 (1976) at page 193 and 194.

(3) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct.

(5) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(6) The decedent acted under duress or under domination of another person.

(7) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrong fulness) of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or intoxication.

(8) The youth of the defendant at the time of the crime.

In light of the fact that we are discussing the constitutionality of the Ohio mitigation and sentencing procedures; we will direct our arguments to the generalized procedure and generalized mitigating factors and respond specifically as to the particular defendant William Bell under Section D of this argument.

We will take each of the mitigating factors as set forth by the Model Penal Code and show how it has been adopted in the Ohio mitigation hearing.

The first mitigating factor in the Model Penal Code is that the defendant has no significant history of prior criminal activity. The Ohio statute specifically requires the Court to consider the history of the offender.

The second mitigating factor in the Model Penal Code is that the murder was committed under the influence of extreme mental or emotional disturbance. This is covered by the Ohio statute when it requires the sentencing judge to consider "The nature and circumstances of the offense" and "the character and condition of the offender" and "the offense was primarily the product of the offenders psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity".

The third mitigating factor in the Model Penal Code is that the victim was a participant or consented to the defendants homicidal conduct. This is clearly covered under the Ohio statute and mitigating factor that says "the victim of the offense induced or facilitated it". This would also be covered under the Ohio statute in so far as "the nature and circumstances of the offense".

The fourth mitigating factor in the Model Penal Code is that the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct. This clearly would be covered in Ohio with regard to the "history, character, and condition of the offender" coupled with the "offenders psychosis".

The fifth mitigating factor in the Model Penal Code was that the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. This clearly is covered in the Ohio statute in the "nature and circumstances of the offense".

The sixth mitigating factor in the Model Penal Code is that the defendant acted under duress or under the domination of another person. This is also covered by the Ohio statute which in addition to "the history, character

and condition of the offender" provides the mitigating factor that "it is unlikely that the offense would have been committed, but the fact that the offender was under duress, coercion, or strong provocation".

The seventh mitigating factor in the Model Penal Code is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of a mental disease or defect or intoxication. This also is clearly covered by Ohio's third mitigating factor on "psychosis or mental deficiency" which "condition is insufficient to establish the defense of insanity"; coupled with the "history, character and condition of the offender".

The eighth and final factor in the Model Penal Code is the youth of the defendant at the time of the crime. The Ohio Supreme Court addressed this issue in this case when it said in its opinion (Appendix 142):

> "we do hold that a defendants age is a primary factor in determining the existence of a mental deficiency."

Thus, the Supreme Court of Ohio does not recognize the age of the offender; in and of itself as being a mitigating factor, but does recognize it as a very important element in determining the existence of a mental deficiency in conjunction with the history, character and condition of the offender.

Thus it can be seen that Ohio legislature has specifically covered practically every item or factor of mitigation as set forth by the drafters of the Model Penal Code.

As this Court stated in the *Gregg* case[35] at page 175:

> ". . . . in assessing a punishment selected by a democratically elected legislature against the constitutional

[35] *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

> measure, WE PRESUME ITS VALIDITY. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And A HEAVY BURDEN RESTS ON THOSE WHO WOULD ATTACK THE JUDGMENT OF THE REPRESENTATIVES OF THE PEOPLE." (Capitalization ours for emphasis)

We are not suggesting that just because the legislature enacted the Ohio capital punishment statute the way it did; that that makes it constitutional. What we are saying is that the elected representatives of the people drafted and adopted the Ohio statute and that it is our belief that the portion of the Ohio capital punishment statute involving mitigation sets forth sufficient broad and general guidelines requiring examination of many specific factors and thus eliminating arbitrariness and capriciousness in the imposition of the death penalty.

As this Court stated in *Proffitt* v. *Florida*,[36] at page 258:

> "While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* ARE SATISFIED WHEN THE SENTENCING AUTHORITY'S DISCRETION IS GUIDED AND CHANNELLED BY REQUIRING EXAMINATION OF SPECIFIC FACTORS THAT ARGUE IN FAVOR OF OR AGAINST IMPOSITION OF THE DEATH PENALTY, THUS ELIMINATING TOTAL ARBITRARINESS AND CAPRICIOUSNESS IN ITS IMPOSITION."
> (Capitalization ours for emphasis.)

[36] *Proffitt* v. *Florida*, 428 U.S. 242 (1976).

If we look at the Texas statute which this Court upheld we find a substantial absence of the many mitigating factors which the Ohio system provides.

We therefore submit that the Ohio statutes provide specific guidelines directing and channelling the judges attention to specific mitigating factors, which are broad and general enough, so that the imposition of the death penalty will not be done in an arbitrary or capricious manner.

The seventh test under the Model Penal Code is that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or intoxication. We submit that the evidence clearly reflected the petitioner did not qualify under any of these mitigating factors. There was absolutely no evidence of a mental disease or defect.

In the pretrial psychiatric report the doctors reflected that the defendant was hedging as to the facts but then gave them a statement. They further indicated that "his perceptions were not distorted and there was no evidence from his history that he was having hallucinations or any other drug effect". (Appendix 39). They further "indicated that he was in contact with reality and his thought processes were clear, logical coherent". (Appendix 39). They further indicated in the pre-trial psychiatric report that the petitioners I.Q. at that time was measured at 90. However, in the psychiatric report presented at the mitigation hearing the defendant-petitioner had an I.Q. of 110 to 120. (Appendix 44).

We do concede that the defendant himself in an unsworn statement at the mitigation hearing and not subject to cross-examination stated that on the night of the brutal murder he took Mescaline and smoked some marijuana at the community center long before the murder (Appendix 76 and 79). He further indicated that the relaxed feeling from the Mescaline and marijuana lasted "about two or three hours" (Appendix 79). However, there was no testimony that the defendant-petitioner had taken any drugs or smoked marijuana after that which he allegedly took at the Community Center. It is the respondents belief that even if we take the facts as submitted by the petitioner to be true; it would have taken at least two or three hours to perpetrate the crimes, and thus the alleged effect of the drug would have been dissipated. It is also to be noted that the three Court appointed psyciatrists unanimously agreed that the petitioner had no perceptual distortions at the time the offense was committed. It is to be noted that the petitioner drove Samuel Hall's brothers' car back to the brother after the kidnapping. He drove the decedents car with the decedent still alive in the trunk out to the isolated area. He parked the car with trunk away from the road so that the trunk was furthest from the road. He then drove the stolen car to Dayton where he and his accomplice Hall the next morning kidnapped a second victim in the same manner as they had just done earlier to the decedent. We concede that certain of his teachers believed him to have a lackadaisical attitude; but none of them thought it serious enough to either keep him from school or to get outside assistance for him.

We therefore submit that the defendant would not qualify even under the seventh category of the Model Penal Code listing of items of mitigation.

The final item in the Model Penal Code is the youth of the defendant at the time of the crime. At the time that the crime was committed the defendant was 16 going on 17. We will concede that if the age of the defendant [illegible]ut anything more is to be considered as a mitigating

factor then the Ohio statute would fail. We also believe that the Florida, Georgia and Texas statutes would also fail if this were the sole and only factor and not related to anything else. The Ohio Supreme Court in this case has rejected such a contention in its opinion in this case. We concur with said Court in its interpretation. Otherwise we would have a pronouncement that irrespective of the brutality of the crime and irrespective of the defendant's participation therein and irrespective of the defendant's prior record; he could not get a death penalty sentence. We do not feel that based on this Courts decisions in this area to date that the age of the defendant, unrelated to anything else, should be the determinative mitigating factor. We are more inclined to adopt the opinion of the Ohio Supreme Court when it said:

> "While rejecting appellant's claim that a minor defendant is per se 'mentally deficient', we do hold that a defendants age is a primary factor in the determination of a mental deficiency." (Appendix 142)

We therefore submit that based on the evidence presented; even under the Model Penal Code the defendant has not reflected any mitigating factors which would eliminate the death penalty.

The second part of the defendant-petitioner's argument in the death penalty cases goes to the question of capital punishment for the non triggerman, or aider and abettor or accomplice.

We thoroughly disagree with the petitioner's argument that the death penalty for a non triggerman today is virtually extinct. Before we even get to this proposition we respectfully submit that there was substantial credible evidence that the petitioner was the actual culprit who killed the decedent.

The Court of Appeals of the First Appellate District of Ohio specifically addressed this question when they stated in their opinion that there was substantial credible evidence to show Bell's participation in the killing.

The Court of Appeals of the First Appellate District of Ohio went on to explain in great detail the petitioners participation in the brutal murder of the decedent.[37]

That Court stated:

> "Evidence of bruises about the body of Graber, the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing, and in concluding THAT BELL EITHER COMMITTED or, actively assisted Hall in MURDERING THE VICTIM . . .
>
> . . . . We hold that the COURT DID NOT ERR IN DETERMINING BELL'S GUILT either AS A PRINCIPLE IN THE MURDER, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory."
> (Capitalization ours for emphasis) (Appendix 159 and 160).

The Court of Appeals of the First Appellate District of Ohio pointed out in their opinion; the defendant Bell clearly knew what was going on and that he was driving the car to a desolated spot solely for the purpose of killing the decedent.[38]

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[37] *State* v. *Bell*, No. C-75068 (1976) unreported and reported in Appendix at pages 158 through 160.

[38] "Had simple robbery been the principal motive, the circumstances of the trios presence in the cemetary would have been without purpose and the slaying utterly pointless; these facts could not have escaped Bell's attention." *State* v. *Bell*, (Appendix 159 and 160).

The Supreme Court in its review also reflected that there was sufficient evidence to prove the defendant guilty either as the principle offender or an aider and abettor (Appendix 139).

For the purpose of the record it should be noted that the indictment charged the petitioner as one of the principle offenders and he was convicted under Ohio law as charged in said indictment.

Thus, for the purposes of the record before this Court; the defendant Willie Lee Bell has been convicted as the principle offender in the death of the decedent.

Even if we were to consider the question of aider and abettor, accomplice or coconspirator we still think the Ohio statute would pass constitutional scrutiny by this court.

It is to be noted that the prelude to the mitigation proceeding provides "the death penalty is precluded when considering THE NATURE AND CIRCUMSTANCES OF THE OFFENSE . . . . ." (Capitalization ours for emphasis)

The Supreme Court of Ohio has specifically reflected that they will consider the nature and circumstances of the offense and the history, character and condition of the offender.[39]

Counsel for the petitioner reflects that the death penalty is virtually extinct in so far as non triggermen are concerned. With this proposition we strongly disagree.[40]

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[39] *State* v. *Bell*, 48 O.S. (2d) 270 (1976) (Appendix 141 and 142).

[40] Counsel made the above generalized statement on page 35 of his brief and he then cited three Florida cases as being supportive of his broad generalized statement. First of all, we submit that the Florida cases were reversed not on the aspects of the non triggerman theory as such but rather on procedural errors or on the fact that the trial judge imposed the death penalty over the jury determination that recommended a life sentence. In the case of *Cooper* v. *State of Florida*, 336 Southern (2d) 1133 the Florida Supreme Court affirmed the death penalty against a person who jointly with another participated in a robbery in which a police officer was killed in the escape. There was no definite proof as to which defendant did the shooting. "No one saw the actual shooting except Cooper. . . . Cooper testified that Ellis followed the Deputy to the patrol car, fired two shots, returned to the Camaro and drove off. Cooper said he was in the passenger seat, where he was later found at all relevant times." The codefendant was subsequently killed in a shootout with police. The Florida Supreme Court held there was sufficient testimony to support the trial court's determination that Cooper fired the fatal shots.

In another Florida case almost exactly in point with the defendant's self serving confession in this case; the Florida Supreme Court upheld the death penalty as against a person who they determined was an aider and abettor. In the case of *Shookey* v. *State of Florida*, 338 So. (2d) 33 (1976) the Court sets up the facts on page 35 as follows:

> ". . . he (the defendant) stated that he had attempted to take a short cut to beat the traffic and that, finding the road he took blocked, he stopped the car. The defendant said at that point that Kirsch put his arm around his grandfather's neck, started choking the victim and told the defendant to kill the motor. The defendant said he did as Kirsch told him and turned the motor and the lights off because he was afraid of Kirsch. Korsch then got the victim out of the car and stabbed him with a knife and beat him with a billy club."

The Florida Supreme Court upheld the death penalty as against the driver of the car.

In addition the Georgia Supreme Court on a number of occasions has upheld the death penalty as to an accomplice or aider and abettor. Three such cases are *State* v. *Smith*, 222 S.E. (2d) 308 (1976); *Coleman* v. *State*, 226 S.E. (2d) 911 (1976), and *Hill* v. *State*, 229 S.E. (2d) 737 (1976).

Thus without going to all the various jurisdictions; we submit that the death penalty has been imposed in Florida and Georgia as to aiders and abettors or co-conspirators.

We submit that the Ohio Statute covers the situation and the Court must give consideration to the "nature and circumstances" of the offense.

In conclusion as to this aspect of the petitioner's arguments we submit that:

(1) The petitioner, based on the evidence, would not even qualify for mitigation under the Model Penal Code.

(2) The Ohio Supreme Court has directed that the Courts liberally construe the statutory phrase "nature and circumstances of the offense."

(3) The defendant was convicted under an indictment charging him with being a principle offender and there was more than a sufficient amount of evidence to support this finding.

(4) The imposition of the death penalty on an aider and abettor or accomplice who actively assists in the crime is not violative of the Constitution of the United States.

D. THE IMPOSITION OF THE DEATH PENALTY UPON AN OFFENDER WHO HAD A LONG RECORD OF OFFENSES WHICH IF COMMITTED BY AN ADULT WOULD BE FELONIES; AND, WHO WAS SIXTEEN AT THE TIME; AND, WHOSE THINKING AT THE TIME OF THE PRESENTENCE EXAM WAS CLEAR, COHERENT AND WELL ORGANIZED AND REFLECTED AN IQ BETWEEN 110 TO 120; AND, WHOSE ATTITUDE WAS "ITS A MATTER OF LIFE AND DEATH" WITH REGARD TO THE CAPITAL OFFENSE FOR WHICH HE WAS CHARGED; AND, WHO WAS EITHER THE TRIGGERMAN OR WHO ACTIVELY AIDED AND ABETTED THE TRIGGERMAN IN THE KIDNAPPING OF THE VICTIM AND KILLING THE VICTIM; AND, WHO HAD GONE OUT WITH HIS ACCOMPLICE AND HAD JUST KIDNAPPED A SECOND VICTIM IN THE SAME MANNER AS THE DECEDENT WITHIN LESS THAN 24 HOURS OF THE DECEDENTS DEATH DOES NOT OFFEND THE CONTEMPORARY STANDARDS OF DECENCY EMBODIED IN THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The petitioner in his brief and in his headnote for this section assumes many facts that are not factually correct and then goes into an argument with regard to accomplices. For the purpose of our presentation; we will divide this portion of the argument into two parts; the first being the history, character and nature of the petitioner and the

second the aider and abettor or accomplice's position insofar as death penalty statutes are concerned.

The lower Courts determined that this petitioner did not meet the standards to receive mitigation of his sentence.

We think that it might be appropriate to check out the evidence presented at the trial and the mitigation hearing to see if the petitioner would meet the guidelines set up by the Model Penal Code referred to by this Court in *Gregg* v. *Georgia*[41] at page 194.

First of all the petitioner had a significant history of prior criminal activity which reflects 7 confrontations with the law and 6 determinations against him. Of the six determinations against him; one was a group of traffic offenses, and should be ignored. However, three of the offenses were crimes which if committed by an adult would be serious felony charges (housebreaking, robbery, auto theft) (Appendix 50).

The second test is clearly inappropriate because there was no evidence that the defendant at the time was under an extreme mental or emotional disturbance.

The third test is also clearly inapplicable because the victim was neither a participant nor consented to the homicidal act.

The fourth test is also clearly inapplicable unless you take the defendant's general attitude of "it's a mater of life and death" as being an excuse in extenuation of his conduct. Certainly neither this Court nor any Court has ever gone so far as to permit such an interpretation.

The fifth test is that the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. We feel that a detailed explanation of the facts as reflected in the

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[41] *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

record will not even give the petitioner the benefit of this mitigating circumstance.

First of all there are only three people who know who pulled the trigger in killing the victim Mr. Graber; the defendant, his accomplice Samuel Hall and the decedent Mr. Graber. On one occasion the accomplice Samuel Hall accused the petitioner of being the triggerman. The petitioner gave a self serving declaration to the police in which he endeavored to reflect that he merely was tagging along after Samuel Hall. However, the independent facts do not necessarily reflect that the petitioner was as passive as he attempted to present himself to the police and the Court. The petitioner and his accomplice perpetrated the kidnapping. The petitioner on his own drove the car; which they had borrowed before the kidnapping back to its owner. The petitioner took over the driving of the stolen car with the victim in the trunk. The petitioner drove the car to the area where the brutal murder took place. In fact, the petitioner drove the car with the victim in the trunk, into the drive and turned the car around so that the trunk of the car was furthest from the road (R. 340). After the car was parked the petitioner in his self serving statement turned to his accomplice Hall; whose style he admired and asked Hall what they were going to do next. As reflected in the record of the trial no one could definitely say who was or was not the triggerman who actually shot and killed the victim, but it was clear that both of them actively participated in the brutal murder. As the facts reflected there were two shotgun blasts with a short interval between them in which according to Bell in his self serving declaration; Hall was going back to the car to get another shotgun shell. If we believe the defendant's self serving declaration as to who fired the shots we then must wonder what was the victim doing. Was he just waiting in the dense under-

brush for the triggerman to come back and successfully kill him or was he being held until the triggerman could get another bullet to finish off the job. As the Supreme Court of Ohio stated in their opinion (Appendix 139):

> "The Court could reasonably disbelieve, AS WE DO, that Graber lay quietly with his hands behind his head while Hall left him alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellants statement to the police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panels rejection of the appellants version and its conclusion that Bell either committed, or actively assisted in the murder."
> (Capitalization ours for emphasis.)

When you then couple these facts with the second kidnapping in Dayton by the petitioner and his accomplice in which once again the victim was ordered into the trunk of his (the victim's) own car and was being kidnapped by the petitioner and his accomplice you have to come up with the conclusion that the defendant was either the triggerman or an active assistant in the perpetration of the brutal murder of the decedent.

Although there are only two people alive who actually know who pulled the trigger of the sawed off shotgun that caused the decedent's death; we respectfully submit that both the petitioner and his accomplice were active participants in the decedent's death.

The next generalized category is that the petitioner was under duress or under the domination of another person. The mitigation hearing reflected that the petitioner was not afraid of his co-defendant Hall (Appendix 43) and that he had taken up with the co-defendant Hall "because he admired his style" (Appendix 44).

The petitioner had ample opportunity on several occasions to abandon the co-defendant but at no time did he ever do so because he liked Hall's style.

II

ADDITIONAL FEATURES OF THE OHIO DEATH SENTENCING PROCEDURE MAKE IT ADEQUATE TO MEET ALL CONSTITUTIONAL CHALLENGES IN SO FAR AS CAPITAL PUNISHMENT IS CONCERNED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

We respectfully submit that in so far as the second part of petitioners brief is concerned, the Ohio statutes have been adopted, and the procedures for review implemented, to assure the evenhanded administration of the death penalty and to insure that it will not be imposed in an arbitrary or capricious manner.

Many of the issues raised by petitioner in this portion of the brief are new and have never previously been raised. However, we believe that the Ohio capital punishment will be upheld on any of the challenges presented in this portion of the brief.

A. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF THE DEATH PENALTY DOES NOT UNCONSTITUTIONALLY DENY THE ACCUSED THE RIGHT TO THE JUDGMENT OF HIS PEERS, REFLECTING COMMUNITY STANDARDS AS TO THE APPROPRIATENESS OF THE DEATH PENALTY IN HIS CASE.

First of all we submit that this issue has never been previously raised either at the trial level, the Court of Appeals of the First Appellate District; the Supreme Court of Ohio, or even in this Court on the Petition for Certiorari. It is to be noted that this Court accepted this case on the test as to whether the Ohio laws were violative of the Eighth and Fourteenth Amendments to the Constitution. As this Court stated in the case of *Irving* v. *California,*[42]

> "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . . ."

We submit that the petitioner has never previously raised the test of the Constitutionality of the Ohio death penalty statute in so far as the Sixth Amendment to the United States Constitution is concerned.

We further submit that even if the petitioner had previously raised this issue; or, even if this Court had accepted this matter on Sixth Amendment grounds; the petitioners arguments are still without merit.

In Ohio, the crime of aggravated murder must be proven beyond a reasonable doubt. The aggravating specification

[42] 347 U.S. 128, 74 S. Ct. (2d) 381 (1954).

(which brings on the death penalty) must also be proven beyond a reasonable doubt, whether the case is tried to the court or to the jury.[43]

Thus it can be seen that under the Ohio system the determination of the defendant's guilt and whether he committed an aggravating specification is done by the judge or jury.

It is only after the defendant has been proven guilty of both the crime and the aggravating specification that the court takes over with regard to the sentence.

To the best of our knowledge there has never been a pronouncement by this Court or any other Court that requires the participation of a jury in the sentencing process after the defendant has been found guilty of the crime and the elements of the crime (specifications) which might increase the punishment.

Prior to *Furman* v. *Georgia,*[44] the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State* v. *Ferguson,* 175 Ohio St. 390, 396 (1964), *State* v. *Frohner,* 150 Ohio St. 53 (1948). This Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha* v. *California.*[45] It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally

[43] Ohio Revised Code 2929.03 (B)

> ". . . The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, . . ."

[44] *Furman* v. *Georgia,* 408 U.S. 238 (1971).

[45] *McGautha* v. *California,* 402 U.S. 183 (1971).

than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

As this Court held in *Proffitt* v. *Florida,*[46] at page 252:

> "The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. THIS COURT . . . . HAS NEVER SUGGESTED THAT JURY SENTENCING IS CONSTITUTIONALLY REQUIRED. And it would appear that judicial sentencing should lead, if anything to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.
>
> The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary and capricious manner."

It is also to be noted Mr. Justice Rehnquist in an opinion rendered on August 8, 1977 denied a rehearing on a Petition for Certiorari on this specific ground.[47]

We therefore submit that the Ohio sentencing procedure by the judge in capital cases after the determination of

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[46] *Proffitt* v. *Florida,* 428 U.S. 242 (1976).

[47] A-108 (76-6720) *Willie Lee Richmond* v. *State of Arizona,* 21 Cr L 4129

> "Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt.*"

guilt of the crime and guilt of the specification in aggravation of the crime beyond a reasonable doubt does not violate the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution.

B. THE OHIO CAPITAL PUNISHMENT PROCEDURES NEITHER COERCE NOR ENCOURAGE A DEFENDANT INTO WAIVING HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY OR HIS FOURTEENTH AMENDMENT RIGHT TO PLEAD NOT GUILTY.

We respectfully submit that the Ohio capital sentencing procedure neither encourages nor discourages a defendant into waiving his right to a trial by jury or to plead not guilty to the crime.

The record reflects that the trial court painstakingly examined both the Petitioner and his counsel to ascertain whether his waiver of a jury trial was totally voluntary. Petitioner voluntarily, intelligently and knowingly waived a trial by jury and elected to be tried by a three-judge panel. At no time did Petitioner or his counsel assert that his Sixth Amendment right to trial by jury was being "chilled" by Ohio's statutory scheme which provides that a three-judge panel must unanimously find an absence of mitigating circumstances.

In fact, a check of the cases out of Hamilton County, Ohio reflects that defendants are choosing juries to determine their guilt or innocence as against choosing a three-judge panel almost four to one.[48]

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[48] Of the twenty-three cases that have emanated as aggravated murder with specification charges and gone to trial in Hamilton County, Ohio;

We submit that the facts clearly refute any allegations by the petitioner that the Ohio procedures in any way chills the petitioner's right to a jury trial or to plead guilty to the crime charged in the indictment.

Unlike the statute in *United States* v. *Jackson,* 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument of coercion on a "numbers" game. That is, it is easier to convince one of the three-judge panel that a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convince is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty of an aggravating circumstance. Without unanimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the right and other considerations which incline toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel. That is what occurred in this case. Petitioner has detailed these considerations, which include the fact that there was no defense of alibi or self-defense, there was a confession which was not suppressed, and there were indications from pre-trial psychiatric reports

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eighteen defendants have had their guilt or innocence determined by a jury and only five have waived a jury. Only one defendant plead guilty to the crime.

that an insanity defense would not prevail. It is submitted it was these considerations that were the basis for the jury waiver.

Mr. Justice Harlan observed in *McGautha* v. *California,*[49] that, "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose", 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

We respectfully submit that based upon the above statistics and based upon the above citations; the above procedure neither encourages jury waivers nor guilty pleas.

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[49] *McGautha* v. *California,* 402 U.S. 183 (1971).

C. THE OHIO CAPITAL MITIGATION PROCEDURES WHICH ORDER THE COURT TO OBTAIN A PRESENTENCE REPORT AND A PSYCHIATRIC REPORT ON THE DEFENDANT AFTER HE HAS BEEN FOUND GUILTY OF THE CRIME AND THE AGGRAVATING SPECIFICATIONS PRIOR TO THE MITIGATION HEARING AND WHICH PLACES ON HIM THE BURDEN OF PERSUASION DOES NOT VIOLATE EITHER THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

We think that first and foremost it should be reflected that at the time of the mitigating hearing the defendant has been found guilty of all of the elements of the crime of aggravated murder and guilty of the aggravating specification beyond a reasonable doubt. All the elements of the capital offense have been proven beyond a reasonable doubt by the time of the mitigation hearing.

The defendant is not required to do anything at this point. The statute mandates that the trial judge order a presentence investigation and orders the Court to order a psychiatric examination of the defendant. Based on these post-trial reports the Court makes its determination as to whether mitigating factors exist. As can be seen, the defendant does not have to do anything. However, if he does nothing, he bears the risk of non persuasion. In Ohio the defendant is given the opportunity of presenting any relevant evidence including his own oral statements not subject to oath or cross-examination.

We submit that the Ohio procedure and the matter with regard to the burden is no different than the Florida statute

already approved by this Court. As this Court held in *Proffitt* v. *Florida* (ibid) at pages 248 and 249 with regard to the Florida mitigation hearing:

> "Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislative specified aggravating and mitigating circumstances. Both the prosecution AND THE DEFENSE may present argument on whether the death penalty shall be imposed.
>
> At the conclusion of the hearing the jury is directed to consider 'WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST . . . WHICH OUTWEIGH THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST;' . . . . The jury's verdict is determined by a majority vote. It is only advisory."
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> (Capitalization ours for emphasis.)

The basic difference in proof as reflected by the Ohio and Florida statutes is that by the time of the mitigation hearing the aggravating specification has already been proven beyond a reasonable doubt. However, it is to be noted; Florida requires the jury to determine that sufficient mitigating circumstances exist which outweigh the aggravating circumstances. We can see little or no difference between saying it in this manner or saying it in the manner pronounced in the Ohio mitigation statute.

As the Ohio Supreme Court stated in the case of *State* v. *Robinson,* 47 O.S. (2d) 103 (1976) at page 107 and reaffirmed in *State* v. *Downs,* 51 O.S. (2d) 47 (1977) at page 55:

> "The other sense of 'burden of proof' is the burden of persuasion. This refers to the risk which is borne by a party if the jury finds that the evidence is in equilibrium. The party with the burden will lose if

> he fails to persuade the trier of fact that the alleged fact is true by such quantum of the evidence as the law demands."

How is this different from the Florida statute which requires the mitigating circumstances to out weigh the aggravating circumstances. If the defendant in Florida shows no mitigating circumstances and if the aggravating circumstances are shown he could lose by virtue of his non participation or non persuasion.

As the Ohio Supreme Court went on to state in the *Downs* case (ibid) at page 55:

> "In a mitigation hearing the defendant does not bear the burden of initial production. Regardless of the defendant's participation or lack thereof in the mitigation hearing, the court has the initial responsibility to require that certain evidence be collected and certain examinations be made. From a careful consideration of those reports and of the evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. If the defendant chooses not to present any evidence, the trial court may nonetheless find in his favor. If he chooses to present evidence, the court must consider any such testimony or documentary proof relevant to the sentencing decision. If the defendant makes a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation. R.C. 2929.03 (D).
>
> As to the burden of persuasion, it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant."

All the elements of the crime including the aggravating specification have been proven beyond a reasonable doubt prior to the mitigation hearing. As this Court held in the

case of *Patterson* v. *New York*, 97 S. Ct. 2319 (1977) at page 2327:

> "We thus decline to adopt as a constitutional imperative . . . that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused. . . . . We therefore will not distrub the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements including the definition of the offense which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."

We cannot emphasize enough that by the time the mitigation hearing is had the defendant has been proven guilty beyond a reasonable doubt of the crime and the aggravating specification. The defendant does not have to do anything. The Court orders the presentence report and the psychiatric examination. The defendant has the burden of showing a mitigating factor. However, as the Supreme Court of Ohio reflected in *State* v. *Downs* (ibid) he doesn't have to do anything. The Court may have sufficient evidence before it to find a mitigating factor without the defendant doing anything.

We therefore submit that the Ohio procedures with regard to the mitigation hearing and the burdens on the defendant at the mitigation hearing do not violate either the Eighth or Fourteenth Amendments to the United States Constitution.

D. THE OHIO PROCEDURE FOR THE IMPLEMENTATION OF THE DEATH PENALTY PROVIDES FOR A MEANINGFUL REVIEW OF DEATH SENTENCES.

Before going into any argument with regard to the above subtopic we believe that a background of the Ohio law with regard to appeals might be appropriate. In Ohio there is a three tier structure with regard to the trial and appeal of criminal cases and more specifically capital cases.

First of all there is the Court of Common Pleas of the particular county where the crime has been committed. This is the trial Court.

We then have the State divided up into Appellate Districts. The First District Court of Appeals of Ohio from which this case emanated covers five counties.[50] Every defendant in every criminal case has a direct right of appeal by right to the Court of Appeals.[51]

If the Court of Appeals affirms the judgment of conviction and sentence; a defendant in a capital case has a right of direct appeal to the Supreme Court of Ohio.[52]

We therefore submit that under Ohio law every defendant convicted of a capital offense has a right of direct appeal to the Supreme Court.

With the fact established that every defendant in a capital case has an absolute right of appeal to the Supreme Court as against an application for leave; we then turn to see what the Ohio Supreme Court has said about their review in capital cases.

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[50] Hamilton, Butler, Clermont, Warren and Brown Counties.

[51] Ohio Rules of Appellate Procedure, Rule 4 (B).

[52] Article IV, Section 2 (B)(2)(a)(ii).

The first Ohio Supreme Court case on the death penalty since the *Furman* case was the case of the *State of Ohio* v. *Bayless,* 48 O.S. (2d) 73 (1976). The Supreme Court in that case at page 86 stated:

> ". . . . this Court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this Court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that the capital sentences are fairly imposed by Ohio's trial judges."

The Ohio Supreme Court further stated in the *Bayless* case (ibid) at page 85:

> "The explicit nature of the specifications allows effective judicial review of whether the jury's verdict was supported by the evidence."

The Court went on to say in the *Bayless* case (ibid) at page 86:

> "It is an essential judicial task to assure that those standards (referring to the standards set up by the legislature for mitigation) be strictly construed in favor of the defendant, to allow the broadest consideration of the mitigating circumstances consistent with their language."

The Ohio Supreme Court stated in the case of *State of Ohio* v. *Osborne,* 49 O.S. (2d) 135 (1976) at page 146:

> "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of the aggravating circumstances provided none of the three mitigating factors exist. All similarly situated defendants are those sentenced alike."

As can be seen from the above quotations the Ohio Legislature has set forth certain specific types of murder which can bring on the death penalty. They have set forth certain aggravating specifications which must be proved beyond a reasonable doubt. They have set forth certain mitigating factors. Thus the legislature has set forth the crime and set forth the areas of mitigation to assure the evenhanded administration of justice and to channel and guide the discretion to assure that the death penalty will not be imposed in an arbitrary or capricious manner. It is the responsibility of the trial court, Courts of Appeal and the Supreme Court to assure the evenhanded administration of capital sentences. We respectfully submit that the Ohio Courts are carrying out their responsibilities under the guidelines for the evenhanded administration of capital sentences and mitigation proceedings.

The trial courts are following the guidelines set up by the legislature to channel the discretion of the mitigation proceeding. As was indicated in the *State of Ohio* v. *William Mascus* (ibid) proceeding the trial courts are giving consideration to the nature and circumstances of the crime and the defendant's participation in the crime in granting mitigation.

The Appellate Courts in Ohio are also following these guidelines in reviewing capital punishments. The two cases of *State of Ohio* v. *Hines* (ibid) and *State of Ohio* v. *Lucas* (ibid) have already reflected how the upper appellate courts in Ohio; when appropriate on the record before them, will follow the legislative guidelines and set aside that portion of the sentence involving the death of the defendants. As will be recalled; that was the Court of Appeals decision in which the death sentences were set aside because the record reflected the mitigating factor that the victim induced the crime.

In another unreported case the Court of Appeals of the First Appellate District set aside a death sentence on the basis of lack of sufficient evidence to support the aggravating circumstance and aggravating factor.[53]

In another capital case the Court of Appeals of the First Appellate District of Ohio set aside eleven consecutive life terms to a capital charged defendant insofar as improper statements by the Court which might have induced him to waive his right to a jury trial.[54]

In still another case emanating out of the Court of Appeals of the First Appellate District of Ohio that Court criticized the trial court in not following the guidelines set up by the legislature with regard to capital cases.[55]

Amongst the rather lengthy decision by the Court of Appeals in that case; they made the following statements:

> "We view the extraordinary procedure adopted by the Court in its disposition of the charges and specification presented against Palmore as raising the issue of discriminatory application of the death penalty."

and

> "This Court has decided in a line of cases . . . that (a) the Ohio statutes imposing the death penalty do not permit arbitrary, discriminatory, and freakish application thereof and thus meet constitutional muster under *Furman* v. *Georgia,* 408 U.S. 238 (1972); and (b) that those same statutes do not impose cruel and unusual punishment contrary to the Federal and State Constitutions."

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[53] *State of Ohio* v. *Deitsch,* C 75385 (rendered November 29, 1976).

[54] *State of Ohio* v. *James Ruppert,* C A 75-08-0067 (rendered August 3, 1977).

[55] *State of Ohio* v. *Curtis Palmore,* C 75231 (rendered December 13, 1976).

and

> "There appears the distinct possibility that if the foregoing Rule 11 (C) (3) is construed to bear the weight the trial court placed on it, the distinct spector of arbitrary and even freakish application of capitol punishment then arises to haunt the Ohio procedure."

and

> "Without laboring the matter further, we conclude that Criminal Rule 11 (C) (3) must be construed to preclude the kind of action taken by the trial court in the *Palmore* case, and its use limited to those instances, as above, WHERE THE ACTION IN DISMISSING THE SPECIFICATION IS SUBJECT TO ASCERTAINABLE, PREDICTABLE AND DEFINABLE PARAMETERS."
> (Capitalization ours for emphasis.)

The Court then went on to set aside a proceeding in which the trial court plea bargained directly with a defendant over the strenuous objections of the State and amongst the reasons given for dismissing the specification was that it would avoid a lengthy trial.

We fully appreciated that the quotations from this case of the Ohio trial Courts or Courts of Appeal are not necessarily binding on this Court. However, we do believe that they clearly reflect that all of the Ohio Courts carefully consider the death penalty within the guidelines of the legislature and the pronouncements of the Supreme Court. They further reflect that the Ohio Courts carefully examine each case in review to make sure that said case falls within the parameter of the guidelines set up by the legislature.

To the best of our knowledge this Court has never set up any specific type of appellate review as passing constitutional muster. The basic difference between Ohio and the Florida laws in regards to appellate review is that the Ohio cases go through one intervening tier of Courts.

The Ohio Appellate Courts scrupulously adhere to the requirements as reflected in the *Bayless* case (ibid) that each case will be independently reviewed as to both aggravating and mitigating circumstances so as to assure that the capital sentences will be fairly imposed.

As can be seen, the Ohio Courts where appropriate, do not hesitate to set aside the death penalty.

Counsel for the petitioner has reflected that the Ohio Supreme Court has only once set aside the death penalty in the twenty-six cases that they have reviewed to date. We submit that this is not inconsistent with the Florida cases and the decisions by the Supreme Court. In preparation for this brief we have endeavored to read every capital decision rendered by the Florida Supreme Court since Furman. A reading of those reported cases will reflect that the Florida Supreme Court has never once set aside the death penalty absent a prior jury recommendation of a life sentence. The Florida Supreme Court in the case of *Tedder* v. *State of Florida,* 322 So. (2d) 908 at page 910 stated:

> "A jury recommendation under our trifurcated death penalty statute should be given great weight, in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting the sentence of death should be so clear and convincing that virtually no reasonable person could differ."

Thus, although the Florida jury is considered to be only advisory; its majority vote by a trial judge can only be set aside where "the facts suggesting death (are) . . . so clear and convincing that virtually no reasonable person could

differ". We submit these are rather strong words to be placed upon an advisory recommendation.

As indicated; to the best of our knowledge by way of the reported cases to date; never has the Florida Supreme Court ever set aside a death penalty where they have not ben confronted with the rule set down by *Tedder* (ibid) or a procedural error.

We submit that the Ohio system of appeal by right to the Court of Appeals and the Supreme Court provides the necessary and appropriate safeguards in the review necessary to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

CONCLUSION

We feel that this Courts pronouncement in *Gregg* v. *Georgia* (ibid) under Section V at page 206 of that opinion is equally applicable to the Ohio statute.

The new Ohio statutes limit the type of murder for which a defendant may receive the death penalty. They also require the prosecution to prove one of the aggravating specifications beyond a reasonable doubt. Only after the crime and the specification have been established does the mitigation portion begin. The Legislature has required that the trial court obtain a presentence report and a psychiatric report on the defendant. The Legislature has set forth certain mitigating factors in order to channel and guide the trial courts discretion. The nature and circumstances of the offense as well as the character and background of the defendant are given substantial weight with regard to the mitigating specifications.

Both the Courts of Appeal in Ohio and the Supreme Court of Ohio carefuily review every case to assure the even handed administration of the death penalty and to assure that it will not be imposed in an arbitrary or freakish manner. The penalty hearing is individualized to the particular defendant within the guidelines of mitigation set up by the Legislature. As this Court held in *Gregg* (ibid) at page 201 and 207:

> "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."

We submit that with the exception of the word jury; the same clause is equally applicable to the Ohio statutes and the procedures thereunder.

We submit that the death sentence imposed on the petitioner in the current case is not in violation of any of his constitutional rights as set forth by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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